Why the British demands on national parliaments must be resisted

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The reality, however, is not so simple. As the prime minister himself explained: 'We are not suggesting a veto for every single national parliament. We acknowledge that in a European Union of 28, that would mean gridlock. But we want to see a new arrangement where groups of national parliaments can come together and reject European laws which are not in their national interest.' 'The precise threshold of national parliaments', he wrote in his letter of the same date to Donald Tusk, President of the European Council, 'will be a matter for the negotiation'.

Like most eurosceptics, Cameron is obsessed by the federalist principle of subsidiarity – which he defined in his speech as 'the question of what is best decided in Brussels and what is best dealt with in European capitals'. He went on: 'We believe that if powers don't need to reside in Brussels, they should be returned to Westminster. So we want to see the EU's commitments to subsidiarity fully implemented, with clear proposals to achieve that'.

The early warning mechanism

It is worth, then, re-examining the current system of national parliamentary involvement in EU affairs, introduced under the Treaty of Lisbon which came into force on 1 December six years ago. We now have ample experience of how Lisbon works both in theory and practice.

By way of pre-legislative scrutiny, each chamber of a national parliament has eight weeks in which to raise a 'reasoned opinion' stating why the draft in question does not comply with the principle of subsidiarity. Each parliament has two votes (divided in eleven bicameral parliaments between two chambers). The European Commission must review the draft law if there is a third against it, and must explain why it decides to maintain, amend or withdraw the draft. This is the 'yellow card'. Where half the votes is cast against the proposal, the Commission, if it maintains the draft, must send to the legislature (Council and European Parliament) a formal justification of its compliance with the principle of subsidiarity which shall be considered and voted on before the first reading stage of the ordinary legislative procedure. In this case, the 'orange card', the measure can be scuppered in the Council by 55% of the member states or by a simple majority of MEPs.

Since Lisbon entered into force, there have been 511 draft EU legislative acts, eliciting no more than 311 reasoned opinions of objection from the 39 national parliamentary chambers – a mere 1.6%. The requisite majority for a yellow card has been reached only twice. There has never been an orange card. The first yellow card was waved against the so-called 'Monti II' proposals which sought to regulate the right to strike for workers posted to an EU state other than their own (COM(2012)130). The Commission held, quite rightly, that there was no transgression of subsidiarity in this case but decided in any case to withdraw the proposal in the face of opposition in both the European Parliament and the Council.

The second yellow card, as I have discussed previously, concerned the proposal to establish the office of European Public Prosecutor (COM(2013)534). The Commission reacted strongly, and has refused to withdraw the proposal. It argues that the measure is necessary to fight crime, is foreseen in the Lisbon treaty, and cannot

be bettered by the efforts of individual member states. In defending the EU's competence and capability in protecting its own financial interests against criminals, the Commission establishes convincingly why the proposed action is in proportion to the scale of the problem and in accordance with the principle of subsidiarity.

Eurosceptics grumble that the Lisbon subsidiarity early warning mechanism is not working well because it has been so little used. Others can make the point that, on the contrary, the system works well enough: neither the Commission nor the Council and European Parliament seem tempted to ignore subsidiarity. While questions can be and are raised about the quality, wisdom or direction of this or that EU law, there is no evidence that the EU institutions are acting *ultra vires*. In other words, Article 5(3) TEU is being respected in that the Union chooses to act in the areas where its competences are shared with its states 'only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States … but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level'.

There is more widespread criticism that the force of EU legislation is disproportionate to the scale of the problem to be addressed, but here the wide variety of national legislative practice confronts the EU legislators with the need to make complex judgements about the size of the sledgehammer relative to that of the nut to crack. Typical of the variety of reasoned opinions provoked by a draft measure is the recent directive on customs infringements and sanctions (COM(2013)884). The Swedish Riksdag argued that the matter should be left to member states; the Danish Folketing found the proposal too wide; while the Lithuanian Seimas found it too lax. While harmonising law across the EU in the interests of maintaining the single market may be an irrelevance to one member state it will be vital to another. Setting norms, lifting standards, improving monitoring and transparency, replacing 28 disparate national laws with one coherent regime is what the EU is for – and, on the whole, does well.

British size does not fit all

It is an absurd paradox that the British, whose own parliament has not been in the forefront of agitators, should be trying to transform the yellow card into a red card when the existing level of orange card has never been reached. The UK government, which normally preens itself on its flexibility and pragmatism, is trying to impose a one-size-fits-all approach on national parliaments, ignoring their very different mandates, powers, practices, timetables and levels of political interest and staff support. The Swedish parliament, the most active of all, insists on delegating its government ministers when they go about their Council business. Most other parliaments seem content to act as watchdog. Some, such as the Slovenian parliament, do next to nothing.

The fact is that waving subsidiarity cards is the least important EU function of national parliaments. National parliaments are heavily engaged in cooperating with the European Parliament over the whole spectrum of EU policy. Specific arrangements are now in place for parliamentary dialogue on foreign and security policy, on internal security issues, and for the 'European semester' on economic and monetary affairs. These interparliamentary activities take time and resources: most national parliaments are already straining to cope with the growing EU dimension of their work. But it is clear from the evidence that a large majority of national parliamentarians wants to communicate with the EU than to complain about it.

In contrast to the very low level of reasoned opinions about subsidiarity (311), there is a very large number of 'political contributions' (1693) dispatched by national parliaments for the edification of the EU institutions. This suggests that most national parliaments are engaged in tracking EU affairs, and have political opinions they wish to be heard. So the recent proposal by COSAC, the coordinating conference of national parliaments, to introduce a 'green card' procedure, whereby legislative initiatives could be proposed to the EU institutions by a number of national parliaments, is a good one.

But if national parliaments are to be given the right to initiate EU laws, that right must also be given – some would say at last – to both chambers of the EU legislature. Such a reform has been resisted in the past on the grounds that MEPs and ministers already have formal and informal methods of influencing the Commission in the design of its legislative work programme (not least Article 225 TFEU for MEPs and Article 241 for ministers). And had the European Parliament been conceded the right of initiative, that very same right would certainly have been seized by the Council – with adverse consequences for the Commission's treaty prerogatives under Article 17

TEU. However, today we must assume that Jean-Claude Juncker's more political Commission is sufficiently mature and confident not to fear a more assertive legislature, nor indeed the presentation of the occasional bright idea from a number of national parliaments. It may be expected that the forthcoming report of Guy Verhofstadt, who is preparing the European Parliament for the next Convention, will reflect these ideas.

The appointment in each national parliament of a rapporteur or coordinator for every important EU dossier would add capability to their efforts both to influence the Council and European Parliament in their law making at the EU level but also to take greater care over the transposition into national law of EU directives, with subsequent monitoring. Such reforms stemming from national parliaments would evince a constructive attitude towards the development of the EU's parliamentary culture. The British government's proposals for 'renegotiation' do the opposite.

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The provocative British demand for a new style of red card may encourage other states to try to tinker with the subsidiarity mechanism, for example by lengthening the eight week suspensive period. Yet as I have proposed elsewhere, the best thing to do with the subsidiarity early warning mechanism is not to tweak it but to abolish it altogether. Freed of this tedious and narrow obligation, national parliaments would then be in a better position to take more of a strategic view about Europe's integration, and to express themselves politically about any piece of EU legislation at any stage of its inception and enactment.

That would be a reform truly worth having. Instead, because of Brexit, we are now condemned to a divisive quarrel about how many national parliaments should be enabled to paralyse EU decision-making in pursuit of 'national interest'.

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